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No. 713

IN THE

Supreme Court of the United States

October Term, 1958

THE SMOOT SAND & GRAVEL CORPORATION, *Petitioner*,

v.

DISTRICT OF COLUMBIA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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The Smoot Sand & Gravel Corporation, by its counsel, prays that a writ of certiorari issue to review the judgment entered in this case by the United States Court of Appeals for the District of Columbia.

OPINIONS BELOW

The opinion of the District of Columbia Tax Court (R. 34-66) is not reported. The opinion of the Court of Appeals is not yet reported, but is printed in the Appendix, *infra*, pp. 1a-12a.

JURISDICTION

The judgment of the Court of Appeals (Appendix, *infra*, p. 13a) was entered on November 26, 1958 and petition for rehearing by full Court was denied on December 19, 1958 (R. 231). Jurisdiction was conferred on the Court of Appeals by D.C. Code Section 47-2404. Jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTIONS PRESENTED

1. Whether the provisions of Sections 47-1580 and 47-1580a of the District of Columbia Code—requiring apportionment in language having a well defined meaning as explained in a long line of Supreme Court opinions and obviously following the general pattern for apportionment enacted by the States of the Union—providing that the "*measure*" of income tax imposed upon corporate income "*shall be* that portion of the net income" which is "*fairly attributable* to any trade or business carried on or engaged in within the District" and requiring that when such business is carried on both *within and without* the District the resulting income "*shall*" be deemed to constitute "income from sources within *and without* the District", can properly be construed to permit or require the District to impose tax upon all income from District sales of sand and gravel when (a) 100% of production is carried on *wholly without* the District, (b) 65% of operating costs is incurred *wholly without* the District, and (c) 50% in value of operating assets is located *wholly without* the District?

2. If the above tax imposing provisions are subject to the construction that income attributable to business carried on in Virginia and Maryland may be fully taxed by the District without apportionment, do such tax imposing provisions violate Article 1, Section 8, the Fifth Amendment, or the Fourteenth Amendment of the Constitution of the United States?

3. Does the holding of the Court of Appeals that statutory provisions requiring apportionment enacted for the

District of Columbia have an entirely different meaning in the District than such statutory terminology has to this Court and throughout the States of the Union constitute an erroneous decision on an important question of federal law?

4. Is the holding of the Court of Appeals that respondent may tax on any basis it sees fit if Congress "does not forbid it" in direct violation of the decisions of this Court holding that Congress may not abdicate and delegate its legislative functions?

STATUTES AND REGULATIONS INVOLVED

The statutes involved are Section 47-1571, Section 47-1580 and Section 47-1580a of the D.C. Code as follows:

"Title VII.—Tax on Corporations

"§ 47-1571. Taxable income defined.

"For the purposes of this title, and unless otherwise required by the context, the words 'taxable income' mean the amount of net income derived from sources within the District within the meaning of sections 47-1580 to 47-1580b.

* * * * *

"Title X.—Purpose of Article and Allocation and Apportionment.

§ 47-1580. Purpose of article.

"* * * The measure of the franchise tax shall be that portion of the net income of the corporation and unincorporated business as is fairly attributable to any trade or business carried on or engaged in within the District and such other net income as is derived from sources within the District: * * *

"§ 47-1580a. Allocation and apportionment.

"The entire net income of any corporation or unincorporated business, derived from any trade or business carried on or engaged in wholly within the District shall, for the purposes of this article, be deemed to be from sources within the District, and shall, along with

other income from sources within the District, be allocated to the District. If the trade or business of any corporation or unincorporated business is carried on or engaged in both within and without the District, the net income derived therefrom shall, for the purposes of this article, be deemed to be income from sources within and without the District. Where the net income of a corporation or unincorporated business is derived from sources both within and without the District, the portion thereof subject to tax under this article shall be determined under regulation or regulations prescribed by the Commissioners. The Assessor is authorized to employ any formula or formulas provided in any regulation or regulations prescribed by the Commissioners under this article which, in his opinion, should be applied in order to properly determine the net income of any corporation or unincorporated business subject to tax under this article."

The Regulations involved are set forth in the Appendix, *infra*, 13a-18a.

STATEMENT

Petitioner is a Delaware corporation engaged in underwater mining, transportation, and sale of sand and gravel (R. 35-36).

During the years involved, 1948 through 1954, 100% of petitioner's sand and gravel was mined in Virginia and Maryland (R. 35). 65% of its operating costs was expended in Virginia and Maryland (R. 47). 50% of its assets was located in Virginia and Maryland (R. 40). Approximately 95% to 98% of its sales was in the District of Columbia (App., *infra*, 2a). The District has fully imposed its income tax on 100% of District sales without any apportionment (R. 36).

Petitioner maintains that under the terms of the tax imposing provisions of the District of Columbia Income and Franchise Tax Act of 1947 and the controlling opinions of this Court directly in point, its production costs and operating assets in Virginia and Maryland must be taken into

account as factors in the apportionment formula utilized for determining that portion of its income "fairly attributable" to the District for income tax purposes.

The District of Columbia Tax Court was of the opinion that petitioner's position was sound. However, the Tax Court was also of the opinion that its hands were tied and that it was forced to decide wrongly against petitioner under *Lever Bros. Co. v. District of Columbia,* 92 App. D.C. 147, 204 F. 2d. 39.

In the course of its opinion *the Tax Court stated* that "It is reasonable to assume that Congress intended that" a "fair and reasonable amount of the net income from" petitioner's District sales of sand and gravel "would be apportioned without and a fair and reasonable portion within the District" (R. 51). The Tax Court further pointed out that if the Supreme Court cases and the terms of the statute are followed "it must be determined that approximately one-half" of petitioner's business "was transacted within the District of Columbia and one-half without the District" (R. 64). The Tax Court continued and stated that "it is true that in this case, as in" the "Hans Rees' Sons, Inc. case formulas used attributed to the" District "'a percentage of income out of all appropriate proportion to the business transacted by the corporation' therein" (R. 64). Nevertheless, the Court felt compelled to decide wrongly against petitioner on the ground that "it must not be overlooked that the same apportionment procedure followed in this case was approved in the Lever Bros. Co., supra" (R. 64).

The Court of Appeals recognized that *this is a case of first impression in the District of Columbia* and pointed out that in *Lever Bros. Co.* v. *District of Columbia, supra,* it was not called on "to decide whether the District statute required the Commissioners' regulations to provide for apportionment of net income on the basis of sales, property values,

and operating costs, instead of exclusively on sales within the District" (App., *infra*, 4a).

In disregard of the findings and position of the Tax Court as to the soundness of petitioner's position, the Court of Appeals decided against petitioner for reasons as follows:

1. That when Congress repealed the 1939 law and enacted the present 1947 law providing for apportionment it made no change in the law because Congress failed to repeal the regulations under the 1939 law (App., *infra*, 6a).

2. That this Court's opinion by Chief Justice Hughes in *Hans Rees' Sons, Inc.* v. *North Carolina*, 283 U.S. 123, 75 L. Ed. 879, is "different" because in that case the business factors carried on in North Carolina allegedly "produced not more than 17% of the income" while the business factors carried on in Virginia and Maryland produced more than 50% of petitioner's income (App., *infra*, 11a).

3. That the District Commissioners have the same taxing powers as State Legislatures when Congress "does not forbid" such legislation by the Commissioners (App., *infra*, 9a).

4. That even though comparable statutes as enacted by the States of the Union require apportionment as requested by petitioner, "the Commissioners were of course not required to adopt what some might deem to be 'the best possible system of taxation'" (App., *infra*, 11a, footnote 9).

As pointed out by the Tax Court, respondent's administration of the 1947 law on a "coming and going" basis has created a chaotic legal jungle for taxpayers in the District of Columbia (R. 61). Respondent has taxed the Southern Railway on the basis of costs, has taxed the Evening Star Newspaper Company on the basis of operating assets and manufacturing, and has taxed petitioner on the basis of sales (R. 141-142). The seriousness of such chaotic lack of uniformity is self-evident (R. 143).

REASONS FOR GRANTING THE WRIT

1. The instant opinion of the Court of Appeals is in direct conflict with the controlling principles established by decisions of the Supreme Court. This Court has consistently held that when local income tax statutes impose tax on a fairly attributable apportionment basis with respect to a unitary business carried on in more than one jurisdiction, "all the factors in that enterprise are essential to the realization of profits" and no one of such factors may be employed to the exclusion of the others "so that the entire net income may be taxed in one state regardless of the extent to which it may be derived from the conduct of business in another state." *Hans Rees' Sons, Inc.* v. *North Carolina, supra; Butler Brothers* v. *McColgan*, 315 U.S. 501, 86 L. Ed. 991; *Underwood Typewriter Co.* v. *Chamberlain*, 254 U.S. 113, 65 L. Ed. 165; *Bass, Ratcliff & Gretton* v. *State Tax Commission*, 266 U.S. 271, 69 L. Ed. 282; and *National Leather Co.* v. *Massachusetts*, 277 U.S. 413, 72 L. Ed. 935.

2. The arbitrary allocation to the District of that portion of petitioner's income clearly attributable to its business carried on in Virginia and Maryland violates both the prohibition of the Fifth Amendment against the taking of property without due process of law or just compensation and of the Fourteenth Amendment against the deprivation of property without due process of law and the denial of equal protection of the laws. See *Hans Rees' Sons, Inc.* v. *North Carolina, supra; Wight* v. *Davidson*, 181 U.S. 371, 45 L. Ed. 900; *Bowling* v. *Sharpe*, 347 U.S. 497, 98 L. Ed. 884; and *Hurd* v. *Hodge*, 334 U.S. 24, 92 L. Ed. 1187.

3. Further, the imposition of tax for the District on petitioner's income clearly attributable to its business carried on in Virginia and Maryland violates Article 1, Section 8 of the Constitution which grants to Congress legislative power over the District of Columbia.

4. In *Eastman Kodak Company* v. *District of Columbia*, 76 App. D.C. 339, 131 F. 2d. 347, it was held that despite

the inequity involved the 1939 law imposed tax on the basis of sales although "from the economic point of view a large portion of the income in question is attributable to activity which took place outside the District." The Court of Appeals then went on to point out in the Eastman Kodak Company case what statutory language would be necessary to provide for apportionment on the basis of the three-factor formula of assets, operating costs, and sales. Thereupon Congress repealed the 1939 law in its entirety and enacted the 1947 law expressly providing for apportionment. Thus, the Court of Appeals told the Congress what language would be necessary to require that operating assets and manufacturing and production costs outside the District shall be taken into account and Congress explicitly adopted the language necessary to effectuate that purpose. Consequently, there can be no doubt that the opinion below has fallen into a most serious error of federal law in failing to carry out the express mandate of Congress as enacted into the 1947 law providing for apportionment.

5. The statutory provisions enacted by Congress in the 1947 law are held by this Court and throughout the States of the Union to require apportionment on such a basis that manufacturing assets and operating costs incurred outside the taxing jurisdiction are taken into account in the apportionment formula. Obviously, statutory terminology cannot properly be held to have one meaning to the Congress, to this Court, and throughout the States of the Union and an entirely different meaning in the District of Columbia (R. 120-121, 127-128, 145-163, 172-211).

6. The holding of the Court of Appeals that respondent may tax on any basis it sees fit if Congress "does not forbid it" is in direct conflict with the decisions of this Court in *Schecter* v. *United States*, 295 U.S. 495, 79 L. Ed. 570 and *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 79 L. Ed. 466. Any such abdication and delegation of the legislative functions of Congress is clearly in violation of Article 1, Section 8 of the Constitution and the decisions of this Court in

Schecter v. United States, supra, and *Panama Refining Co. v. Ryan, supra.*

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 14,290, 14,291, 14,292, 14,293, 14,294

THE SMOOT SAND AND GRAVEL CORPORATION, PETITIONER

v.

DISTRICT OF COLUMBIA, RESPONDENT

On Petition for Review of Decisions of the District of Columbia Tax Court

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Decided November 26, 1958

Mr. David R. Shelton for petitioner.

Mr. Henry E. Wixon, Assistant Corporation Counsel for the District of Columbia, with whom *Messrs. Chester H. Gray*, Corporation Counsel, and *Milton D. Korman*, Principal Assistant Corporation Counsel, were on the brief for respondent.

Before EDGERTON, BAZELON and WASHINGTON, Circuit Judges.

WASHINGTON, *Circuit Judge:* The Smoot Sand and Gravel Corporation petitions for review of decisions of the District of Columbia Tax Court determining that deficiencies in franchise taxes assessed against the petitioner and paid to the District for the years 1948 to 1954, inclusive, were correctly assessed. The appeal questions the validity of regulations promulgated by the Commissioners to govern the apportionment to the District for franchise tax purposes of a part of the net income of petitioner's business, which was carried on partly within and partly

without the District. The controlling statute is the District of Columbia Income and Franchise Tax Act, D.C.CODE §§ 47-1571, 47-1571a, 47-1580, and 47-1580a (1951).

The petitioner is a Delaware corporation having its principle office in the District of Columbia. It removes washes, and grades sand and gravel along the shores of the Potomac River and its tributaries in Maryland and Virginia and transports the processed material in scows by tugboat to three "plants" in the District of Columbia where the products are stored and sold. During the taxable years in question approximately 95% of the sand and gravel was disposed of in the District of Columbia through sales effected at the three District plants, and the remaining 5% was sold in Alexandria, Virginia. The Assessor for the District assessed and collected taxes on approximately 95% of petitioner's net income for each of the taxable years, pursuant to regulations issued by the Commissioners requiring, in the case of a business consisting of the manufacture and sale of tangible personal property carried on partly within and partly without the District, that the portion of the net income to be apportioned to the District for franchise tax purposes shall be the percentage that sales made in the District during the taxable year bear to total sales everywhere during that year.[1] The Tax Court affirmed the assessments,

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[1] The pertinent parts of the Regulations Pertaining to Income & Franchise Taxes, promulgated on August 31, 1948, read:

"Sec. 10-2. The measure of the franchise tax shall be that portion of the net income of a corporation or unincorporated business as is fairly attributable to any trade or business carried on or engaged in within the District, as defined in the Act, and such other net income as is derived from sources within the District. The portion of such net income which is 'fairly attributable' to any trade or business or such other net income as is derived from sources within the District shall be determined by allocation and apportionment thereof as prescribed in Sections 10-2(b), 10-2(c), 10-2(d), 10-2(e).

* * * *

"Sec. 10-2(b). . . . If the gross income is derived from engaging in a trade or business partly within and partly with-

taking the view that this court had upheld the validity of this regulation in *Lever Bros. Co.* v. *District of Columbia*, 92 U.S.App.D.C. 147, 153, 204 F.2d 39, 45 (1953), and *District of Columbia* v. *Radio Corporation of America, supra*, note 1. See also *Eastman Kodak Co.* v. *District of Columbia*, 76 U.S.App.D.C. 339, 131 F.2d 347 (1942), and *Panitz* v. *District of Columbia*, 74 App. D.C. 284, 122 F.2d 61 (1941).

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out the District or from sources both within and without the District, such gross income shall be allocated and apportioned in accordance with the specific provisions or formulae prescribed in these regulations.

* * * *

"Sec. 10-2(d). Income from Trade or Business. If the trade or business is carried on entirely within the District, the entire gross income from trade or business shall be allocated to the District. If the trade or business is carried on partly within and partly without the District, that portion of the gross income from trade or business to be apportioned to the District shall be determined as follows:

"(1) Income from sales of tangible personal property.

"a. Where gross income for any taxable year is derived from the manufacture and sale or purchase and sale of tangible personal property, the portion thereof to be apportioned to the District shall be such percentage of the total of such gross income as the District sales made during such taxable year bear to the total sales made everywhere during such taxable year."

These regulations were stated in Section 17 to be effective from January 1, 1948. In any event, the regulations of November 27, 1947, would, as the Tax Court recognized, have had the same effect. The regulations issued on March 17, 1953, and August 6, 1953, were substantially the same insofar as concerns the apportionment formula: cf., as to the definition of "District sales," District of Columbia v. Radio Corporation of America, 98 U.S. App. D.C. 119, 232 F. 2d 376, cert. denied, 352 U.S. 845 (1956). We have no occasion in this opinion to consider other parts of the August 6, 1953, regulations.

Although Sections 10-2(b) and 10-2(d), as quoted above, refer to "gross income" we do not construe this as a direction for apportionment of "gross" income in view of the provisions of Section 10-2 which limit the apportionment to net income. The word "gross" was eliminated in the edition of the regulations promulgated on August 6, 1953.

The petitioner apparently agrees that it "manufactures" and sells sand and gravel and that it falls within the reach of the regulation.[2] Its contentions here are that under the language of the governing statute, its net income must be apportioned by a formula which takes into account its property values and operating costs, as well as sales; that the regulation is invalid because it directs the apportionment of net income by considering only sales; and that this issue was not raised or decided in the *Lever Bros.* and *RCA* cases.

We agree that in *Lever Bros.* and *RCA* we were not called on specifically to decide whether the District statute required the Commissioners' regulations to provide for apportionment of net income on the basis of sales, property values, and operating costs, instead of exclusively on sales within the District. But we stated in *Lever Bros.*:

> "Certainly the due process clause does not require apportionment of part of the gross receipts from sales to the jurisdiction of manufacture. [Citing cases] We conclude, therefore, that the regulation prescribed by the Commissioners for the year 1948 and applied by the Assessor was valid under the Act . . . ." 92 U.S.App.D.C. at 153, 204 F.2d at 45.

And in the *Panitz* and *Eastman Kodak* cases we ruled, under earlier tax statutes, that an apportionment formula based solely on sales may validly be applied to multi-state business enterprises, even though production of the article sold occurred outside the District. Nevertheless, we will consider here the precise contentions petitioner makes.

The statute involved in this case imposes, for the privilege of carrying on or engaging in any trade or business within the District, a franchise tax at the rate of 5%

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[2] In this case then we are not concerned with the rule prescribed or followed for other corporations which do not manufacture and sell tangible personal property.

upon the net income of every corporation which is derived from sources within the District. D.C.Code §§ 47-1571, 47-1571a, and 47-1580 (1951). Section 47-1580 provides that the measure of the tax "shall be that portion of the net income of the corporation . . . as is fairly attributable to any trade or business carried on or engaged in within the District." In addition, Section 47-1580a of the Code provides:

> "If the trade or business of any corporation . . . is carried on or engaged in both within and without the District, the net income derived therefrom shall, for the purposes of this article, be deemed to be income from sources within and without the District. Where the net income of a corporation . . . is derived from sources both within and without the District, the portion thereof subject to tax under this article shall be determined under regulation or regulations prescribed by the Commissioners."

It will immediately be noted that the statute does not direct the Commissioners to give weight to any particular factors in prescribing a formula to determine the portion of net income which is fairly attributable to the business carried on within the District. Thus the regulation in issue, which relies on sales as the determinative factor, does not violate a specific statutory provision as to the factors to be taken into account. Nor does the regulation violate the statutory direction that where a business is carried on both within and without the District, the net income therefrom shall be deemed to be income from sources within and without the District. The regulation in terms prescribes a formula for apportionment of income in the situation where sales are in fact made outside the District as well as within it, and we read it as being so limited in application. The regulation thus will inevitably apportion or divide the net income, on the basis of sales, between the District and other taxing jurisdictions where sales are made.

Nor is there any basis for reading into the statute an implied prohibition against use of the sales factor alone in making apportionment. The present statute was enacted in 1947. This was some years after this court had upheld—in *Eastman Kodak* and *Panitz*—the use of the formula here in question under earlier statutes. Although for the first time the present statute used the words "fairly attributable," and included the provision that the net income of a multi-state business shall be deemed to be income from sources within and without the District, Congress delegated to the Commissioners the task of making the rules to determine the part of the net income which is to be considered to be derived from sources within the District—and it did this in the light of the established regulation. If Congress had thought that the part of the net income which was fairly attributable to the District in the case of a manufacturing and selling business could not properly be determined by an apportionment formula which took into account the sole factor of sales in the District as compared with total sales, it could easily have so stated. In the circumstances its failure to do so is significant, not only eliminating any basis to infer disapproval of the rule, but giving some basis to infer approval.

Petitioner urges that the inclusion of these new provisions in the present statute was brought about by certain Supreme Court decisions and that Congress necessarily intended to require the use of a three-factor apportionment formula based on sales, manufacturing costs, and property values. Of the fives cases relied on by petitioner, three—*Underwood Typewriter Co.* v. *Chamberlain*, 254 U.S. 113 (1920); *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Commission*, 266 U.S. 271 (1924); *National Leather Co.* v. *Massachusetts*, 277 U.S. 413 (1928)—sustained use of a one-factor formula under the proof adduced. One—*Hans Rees' Sons* v. *North Carolina*, 283

U.S. 123 (1931)—held, under the proof, that the statutory one-factor formula involved, based on property values rather than sales, achieved an arbitrary and unreasonable result in respect of the taxpayer before it. The fifth case—*Butler Bros.* v. *McColgan*, 315 U.S. 501 (1942)—involved a three-factor formula, but not a formula identical with the formula contended for by petitioner here. We find nothing in these decisions to support an inference that in the District statute Congress intended to direct the use of any particular formula, much less the particular three-factor formula urged by the petitioner.

A somewhat comparable provision of the Federal income tax law provides little assistance here. Section 119(e) of the Internal Revenue Code of 1939, 53 STAT. 35, 26 U.S.C. § 119(e),[3] provides, for Federal income tax purposes, that income

> "(2) from the sale of personal property produced (in whole or in part) by the taxpayer within and sold without the United States, or produced (in whole or in part) by the taxpayer without and sold within the United States, shall be treated as derived partly from sources within and partly from sources without the United States."

And that

> "the portion of such net income attributable to sources within the United States may be determined by processes or formulas of general apportionment prescribed by the Commissioner with the approval of the Secretary."

The District statute undeniably has some similarities, but its enactment in 1947 does not require the conclusion that the District Commissioners were to be bound by the regu-

[3] See also INT. REV. CODE of 1954, § 863(b).

lations issued under the Federal statute.[4] This is confirmed by the omission in the present District statute of the previous provision that the Assessor "shall apply as far as practicable the administrative and judicial interpretations of the Federal income tax law."[5] The failure to reenact this provision, or one similar to it, indicates quite clearly that Congress did not intend to direct that the Commissioners base their regulations on those promulgated under the Federal statute, particularly in view of the existing District regulations which were not repudiated. Moreover, the District statute levies a franchise tax for the privilege of doing business in the District, and the criteria which are to be taken into account for the taxing of such a privilege are not necessarily the same as, or even similar to, those for a Federal tax on income.

There being no statutory bar to the apportionment formula adopted in the regulation, the questions remain whether the regulation is inherently arbitrary and unreasonable; or, if not inherently unreasonable, whether the petitioner has shown that, as applied to it, the regulation unreasonably apportions to the District income which properly has no relation to the privilege of doing business here.

On the first question *Eastman Kodak* and *Panitz* would seem to supply the answer. Apportionment of income by using a one-factor formula was upheld as against constitutional attacks in the *Underwood Typewriter, Bass, Ratcliff & Gretton, Ltd.*, and *National Leather* cases, *supra*. "And the gross receipts formula has been in operation too long and upheld in the courts too frequently to be attacked

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[4] In any event, the Federal regulations would not support use of the formula urged by petitioner here. See Section 29.119-12 par. A Case 2A of Treas. Regs. 111, and Section 39.119(c)-1(b) Case A2 of Treas. Regs. 118, promulgated under the Internal Revenue Code of 1939.

[5] See D.C. Code § 47-1529(a) (Supp. VI, 1957).

as unfair or unreasonable *per se* or in the abstract."[6] See *Ford Motor Co.* v. *Beauchamp*, 308 U.S. 331 (1939); *International Harvester Co.* v. *Evatt*, 329 U.S. 416, 420-21 (1947); *Norfolk & Western Ry. Co.* v. *North Carolina*, 297 U.S. 682 (1936); *Maine* v. *Grand Trunk Ry. Co.*, 142 U.S. 217, 228 (1891). The *Ford Motor* case is particularly apropos. If a legislature can base apportionment of the subject taxed on the single factor of gross receipts from sales, it must follow that the Commissioners in the exercise of their delegated rule-making power may also do so, if the statute, as here, does not forbid it, and if no other compelling consideration prevents it.[7]

There is no basis for the view that the sales formula adopted here bears no "real and reasonable relation to the privilege granted," *New York* v. *Latrobe*, 279 U.S. 421, 427 (1929). Not only was such a view rejected in the *Ford Motor* case, but it seems obvious that sales made in the District bear a reasonable relation to the privilege of doing business here. The receipts from such sales were in fact derived from District sources and they represented a material attribute of the business carried on here. Although the product sold in the District was "manufactured" to a large extent outside the District, it is not

[6] Quoted from Household Finance Corp. v. State Tax Commission, 212 Md. 80, 93, 128 A. 2d 640, 646 (1957).

[7] It may be noted that in the Ford Motor case the statute apparently did not use the expression "fairly attributable," as does the statute now before us. Nor, so far as appears, did the statutes involved in Underwood Typewriter, Bass, Ratcliff & Gretton, Ltd., and National Leather Co. contain such language. But in all of these cases the Supreme Court determined that the statutory one-factor apportionment formula, under the proof presented, did not arbitrarily, unreasonably, or unjustly attribute to the state profits earned elsewhere. Butler Bros. v. McColgan, 315 U.S. 501 (1942), construed the statutory phrase "reasonably attributable" in this light on the authority of some of these cases. We think the term "fairly attributable" in the District statute is to be construed in the same way.

inherently arbitrary or unreasonable to tax the privilege of carrying on business[8] in its setting as a part of the activities and perquisites of a larger organization having out-of-state business transactions as well. See *International Harvester Co.* v. *Evatt, supra*, p. 423; *Ford Motor Co.* v. *Beauchamp, supra*, pp. 336-37; *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Commission, supra*, p. 282.

The petitioner failed to show that the apportionment formula produces an arbitrary and unreasonable result as applied to it. Although it urges that the part of its net income which is fairly attributable to business done in the District must be measured by a three-factor formula, consisting of manufacturing costs incurred, and business property located, in the District as well as sales made here, it offered no evidence which would compel the use of these two additional factors. The manufacturing costs were deducted in their entirety in arriving at the net income which was allocated. Certainly reason does not require that they again be considered as a factor in the allocation, in the absence of evidence showing a necessity for it. The value and situs of the corporation's property used in its operation could doubtless have been ruled to be a permissible factor in apportioning income (cf. *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Commission*, 266 U.S. 271; *National Leather Co.* v. *Massachusetts*, 277 U.S. 413), but to say that this would be permissible does not demonstrate that it must be considered an indispensable factor. In short, the evidence fails to demonstrate clearly and cogently that the use of either or both factors would produce a more accurate apportion-

[8] Petitioner not only sold its product here, but its principal office was in the District, where its fiscal and accounting affairs were handled and the general management of all its affairs was conducted.

ment,[9] or that any specified percentage of the net income was alone attributable to either factor. Cf. *Norfolk & Western Ry. Co.* v. *North Carolina*, 297 U.S. 682 (1936). Significantly there was also no proof tending to show what part of the net income was actually earned or produced by the business activities carried on in the District. We thus are given no basis to conclude that the formula used to apportion net income resulted in attributing to petitioner's privilege of doing business in the District a greater value than it actually had. This case is far different from *Hans Rees' Sons* v. *North Carolina*, 283 U.S. 123 (1931), where the proof showed that the income was derived from three sources, of which only two—the manufacturing and tanning operations which produced no more than 17% of the income—were carried on in North Carolina.

Not only is there no express showing that the District has allocated to itself tax values beyond its jurisdiction, but the view that it has done so seems greatly weakened by the fact that the petitioner has never been required to pay any income or franchise taxes to the states of Maryland or Virginia.[10] Cf. *American Bemberg Corp.* v. *Carson*, 188 Tenn. 263, 276-77, 219 S.W. 2d 169, 174 (1949). Thus, we are not here presented with a situation where the District is in competition with other taxing jurisdictions for an apportionment of petitioner's net income.

The regulations authorize the Assessor to give relief to a taxpayer if the apportionment formula prescribed results in an "inequitable" tax in any specific instance.

---

[9] We recognize of course that some, perhaps most, states take one or both such factors, or even other factors, into account in apportioning income for tax purposes. But we are concerned here only with the apportionment formula provided for the District, and the Commissioners were of course not required to adopt what some might deem to be "the best possible system of taxation." New York v. Latrobe, 279 U.S. at 427.

[10] It pays only personal and real property taxes to these states.

Section 10-2(d)(1)c(4) of the regulations of August 31, 1948;[11] Section 10-2(d)(4) of the regulations of August 6, 1953.[12] There is a reference in the record to a protest filed by the petitioner on March 13, 1952, but the protest was not offered in evidence. We are not informed as to its contents and cannot assume that the petitioner sought the administrative relief authorized by the regulations. In view of petitioner's failure to show that it has exhausted the administrative remedy, and of our holding upon the contentions advanced by it, petitioner cannot now ask this court to hold that the assessments were invalid and erroneous. *Gorham Manufacturing Co.* v. *Tax Commission*, 266 U.S. 265 (1924); cf. *Thomas Paper Stock Co.* v. *District of Columbia*, —— U.S. App. D.C. ——, 255 F. 2d 180 (1958).

Affirmed.

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[11] This section reads as follows:

"If it shall appear to any taxpayer that the formulae herein prescribed are inapplicable to its business or will operate so as to apportion to the District a greater portion of the net taxable income of such taxpayer than is fairly attributable to the District, such taxpayer may file with the Assessor a statement of its objection to the use of such formulae together with a proposed alternative method of apportionment.

* * * *

"If, however, the Assessor shall conclude that the use of any of the formulae or methods herein referred to would result in an inequitable tax in any specific instance, he shall determine the gross income from within the District by such other methods as, in his opinion, is equitable. . . ."

[12] The provision in the regulation of August 6, 1953, is set out in Thomas Paper Stock Co. v. District of Columbia, —— U.S. App. D.C. ——, 255 F. 2d 180, 181 (1958).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 14,290, 14,291, 14,292, 14,293, 14,294

THE SMOOT SAND AND GRAVEL CORPORATION, *Petitioner*

v.

DISTRICT OF COLUMBIA, *Respondent*

On Petitions for Review of Decisions of the District of Columbia Tax Court.

Before: Edgerton, Bazelon and Washington, Circuit Judges.

JUDGMENT

These cases came on to be heard on the record on appeal from the District of Columbia Tax Court, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the decisions of the said Tax Court on review in these cases are affirmed, with costs.

Per Circuit Judge WASHINGTON.

Dated: Nov 26 1958

REGULATIONS INVOLVED

As to the Regulations under the District of Columbia Income and Franchise Tax Act of 1947, here involved, it was proved in the instant case that on March 19, 1948, Corporation Counsel Vernon E. West and Assistant Corporation Counsel George C. Updegraff—in the presence of District of Columbia Assessor Edward A. Dent—testified before a Joint Subcommittee of the United States Congress, as reported at page 105 of "Hearings Before the Joint Subcommittee on Fiscal Affairs of the Committees on the Dis-

trict of Columbia, Congress of the United States" and advised the Congress as follows:

> "Mr. West. Before you get off that, I think I can clarify this and I think I am correct in my statement: If for example, a company sells goods in the District of Columbia manufactured outside of the District of Columbia, from which it makes a net profit of $100,000, let us say, we don't treat that whole $100,000 profit as being taxable in the District of Columbia. Because part of that profit was earned by the manufacturer, and only part of it by the sale.
>
> "So under our system or formula, half of the profit would be allocated to the District of Columbia and half elsewhere.
>
> "Is that not correct, Mr. Updegraff?
>
> "Mr. Updegraff. That is correct.
>
> "Senator Cain. I can understand that. • • • ".

Regulations promulgated by the Commissioners of the District of Columbia on August 31, 1948 were as follows:

> "Sec. 10-2. The measure of the franchise tax shall be that portion of the net income of a corporation or unincorporated business as is fairly attributable to any trade or business carried on or engaged in within the District, as defined in the Act, and such other net income as is derived from sources within the District. The portion of such net income which is 'fairly attributable' to any trade or business or such other net income as is derived from sources within the District shall be determined by allocation and apportionment thereof as prescribed in Sections 10-2(b), 10-2(c), 10-2(d), 10-2(e).
>
> • • • •
>
> "Sec. 10-2(b). • • • If the gross income is derived from engaging in a trade or business partly within and partly without the District or from sources both within and without the District, such gross income shall be allocated and apportioned in accordance with the specific provisions or formulae prescribed in these regulations.
>
> • • • •

"Sec. 10-2(d). Income from Trade or Business. If the trade or business is carried on entirely within the District, the entire gross income from trade or business shall be allocated to the District. If the trade or business is carried on partly within and partly without the District, that portion of the gross income from trade or business to be apportioned to the District shall be determined as follows:

"(1) Income from sales of tangible personal property.

"a. Where gross income for any taxable year is derived from the manufacture and sale or purchase and sale of tangible personal property, the portion thereof to be apportioned to the District shall be such percentage of the total of such gross income as the District sales made during such taxable year bear to the total sales made everywhere during such taxable year. For the purpose of this regulation the phrase 'District sales' shall mean the gross receipts from all sales made which were principally secured, negotiated, or effected by owners, employees, agents, officers and branches of the corporation or unincorporated business located in the District; and the phrase 'total sales' shall mean the gross receipts from all sales.

* * * * *

"c. * * * (4) * * * If it shall appear to any taxpayer that the formulae herein prescribed are inapplicable to its business or will operate so as to apportion to the District a greater portion of the net taxable income of such taxpayer than is fairly attributable to the District, such taxpayer may file with the Assessor a statement of its objection to the use of such formulae togther with a proposed alternative method of apportionment.

* * * *

"If, however, the Assessor shall conclude that the use of any of the formulae or methods herein referred to would result in an inequitable tax in any specific instance, he shall determine the gross income from within the District by such other method as, in his opinion, is equitable. * * *"

It appears that the above Regulations of August 31, 1948 were again promulgated on October 16, 1950, without change.

Regulations promulgated on March 17, 1953, were as follows:

> "Sec. 10-2(d)(1)a. Where gross income for any taxable year is derived from the manufacture and sale or purchase and sale of tangible personal property, the portion thereof to be apportioned to the District shall be such percentage of the total of such gross income as the District sales made during such taxable year bear to the total sales made everywhere during such taxable year. For the purpose of this regulation the phrase 'District sales' shall mean the gross receipts from all sales made which were principally secured, negotiated, or effected by owners, employees, agents, officers and branch of the corporation or unincorporated business in the District; and the phrase 'total sales' shall mean the gross receipts from all sales."

Regulations promulgated August 6, 1953, were as follows:

> "Sec. 10-2. The measure of the franchise tax shall be that portion of the net income of the corporation and unincorporated business as is fairly attributable to any trade or business carried on or engaged in within the District, as defined in the Act, and such other net income as is derived from sources within the District. The portion of such net income which is 'fairly attributable' to any trade or business or such other net income as is derived from sources within the District shall be determined by allocation and apportionment thereof as prescribed in Secs. 10-2(b), 10-2(d), 10-2(e).
>
> . . . . .
>
> "Sec. 10-2(b). * * * If the net income is derived from engaging in a trade or business partly within and partly without the District or from sources both within and without the District, such income shall be allocated and apportioned in accordance with the

specific provisions or formulae prescribed in these regulations.

* * * *

"Sec. 10-2(d). * * * If the trade or business is carried on partly within and partly without the District, that portion of the net income from trade or business to be apportioned to the District shall be determined as follows:

"(1) Income from sales of tangible personal property.

"a. Where income for any taxable year is derived from the manufacture and sale or purchase and sale of tangible personal property, the portion thereof to be apportioned to the District shall be such percentage of the total of such income as the District sales made during such taxable year bear to the total sales made everywhere during such taxable year. Every corporation and unincorporated business which carries on or engages in business in the District within the meaning of the words 'trade or business' as defined in the Act is, unless specifically exempted by some provision of the Act, subject to tax. For the purpose of this regulation, the phrase 'District sales' shall mean all sales to District customers the income from which is fairly attributable to the trade or business carried on or engaged in within the District, including solicitation in the District by salesmen or other representatives of the taxpayer, that portion of sales to customers outside the District the income from which is fairly attributable to the trade or business carried on in the District, and sales of tangible personal property the income from which is from District sources.

"(2) Where income for any taxable year is derived from work done or services performed, the portion thereof to be apportioned to the District shall be such percentage of the total of such income as the aggregate of charges for or costs of such work done and services performed in the District bears to the aggregate of such charges for or costs of work done and services performed by the taxpayer everywhere. The Assessor is authorized to use the aggregate of 'charges' or the aggregate of 'costs' with respect to work done

and services performed if in his opinion it will produce an equitable apportionment.

• • • •

"(4) Where the Assessor shall determine that the formulae herein prescribed are inapplicable or inequitable to the taxpayer and the District in any case, and that the net income of such taxpayer from within the District may be more accurately determined by the use of separate accounting, such taxpayer shall report its net income from within the District on the basis of separate accounting and the tax shall be assessed on such basis."

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BRIEF FOR RESPONDENT IN OPPOSITION

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 713

THE SHOOT SAND AND GRAVEL CORPORATION, *Petitioner*,

v.

DISTRICT OF COLUMBIA, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

CHESTER H. GRAY,
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CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS CITED

Constitutional Provisions Cited 1

Statutes Cited:

District of Columbia Income and Franchise Tax Act of 1947, 61 Stat. 328, ch. 258, as amended by the Act of May 3, 1948, 62 Stat. 206, ch. 246, and by Title IV, District of Columbia Revenue Act of 1949, 63 Stat. 112, ch. 146, and by Title XII of the District of Columbia Public Works Act of 1954, 68 Stat. 101, ch. 218 ..... 2, 3, 4, 7

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 713

THE SMOOT SAND AND GRAVEL CORPORATION, *Petitioner*,

v.

DISTRICT OF COLUMBIA, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at 261 F. 2d 758. The opinion of the District of Columbia Tax Court (R. 34-66) is not reported.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Petitioner, although it relies upon the Fifth and Fourteenth Amendments to the Constitution, has not included

the text of these Amendments in its petition for writ of certiorari. Respondent, although it does not believe that the Fifth and Fourteenth Amendments to the Constitution are applicable in this case, has, for the convenience of the Court included in the appendix to its brief, the text of the Amendments together with the Statutes and Regulations involved.

Statutes Involved

Section 4(h), Article I, Title I, Sections 1 and 2(a), Article I, Title III, Sections 1 and 2, Article I, Title VII, Sections 1 and 2, Article I, Title X, District of Columbia Income and Franchise Tax Act of 1947, 61 Stat. 328, ch. 258, as amended by the Act of May 3, 1948, 62 Stat. 206, ch. 246, and by Title IV, District of Columbia Revenue Act of 1949, 63 Stat. 112, ch. 146, and by Title XII of the District of Columbia Public Works Act of 1954, 68 Stat. 101, ch. 218.

Regulations Involved

There is no official citation for the Regulations promulgated by the Commissioners of the District of Columbia under the District of Columbia Income and Franchise Tax Act of 1947, as amended.

QUESTIONS PRESENTED

In the view of respondent, the questions presented are:

1. Where the District of Columbia Income and Franchise Tax Act of 1947, as amended, provides for the imposition of a franchise tax upon corporations engaged in business in the District of Columbia measured by "that portion of the net income of the corporation or unincorporated business as is fairly attributable to any trade or business carried on or engaged in within the District and such other net income as is derived from sources within

(R. 35-36). The corporation maintains no offices in Maryland, although it leases a small office in Alexandria, Virginia. No facilities are maintained by Smoot in Alexandria for the sale of sand or gravel. Any person desiring to purchase sand and gravel from Smoot is required to obtain these commodities from the corporation's plants and facilities in the District (R. 248). Title to all of the sand and gravel sold by the corporation in the District passes to the purchaser in the District. From 1948 through 1954, approximately 95 percent of the corporation's sales of sand and gravel were made in the District of Columbia (R. 36, 91, 250-252).

The corporation does not now and never has paid any income or franchise taxes to either the State of Maryland or the State of Virginia, and the District of Columbia is the only jurisdiction to which the corporation pays a tax of this nature. The only taxes of any kind which the corporation pays to Maryland and Virginia are personal property taxes and real estate taxes on real property owned by the corporation in those states (R. 254, 255).

Acting pursuant to regulations promulgated by the Commissioners of the District of Columbia under the District of Columbia Income and Franchise Tax Act of 1947, as amended, the Assessor of the District assessed and collected for the years 1948 to 1954 taxes on approximately 95 percent of the corporation's net income for each of the taxable years involved, based upon the percentage which the corporation's sales of sand and gravel in the District of Columbia bore to its sales of sand and gravel everywhere (R. 91-103). The assessments made against the corporation by the assessor were affirmed by the District of Columbia Tax Court and the decisions of the Tax Court were, in turn, affirmed by the United States Court of Appeals for the District of Columbia Circuit (R. 104).

On February 20, 1959, Smoot Sand & Gravel Corporation filed in this Court a petition for writ of certiorari. The petition for a writ of certiorari states:

> "The District of Columbia Tax Court was of the opinion that petitioner's position was sound. However, the Tax Court was also of the opinion that its hands were tied and that it was forced to decide wrongly against petitioner under *Lever Bros. Co.* v. *District of Columbia*, 92 U.S. App. D.C. 147, 204 F. 2d 39." (Petition, p. 5).

Nowhere in the opinion of the District of Columbia Tax Court does that court indicate, as stated by petitioner in its brief, "that it was forced to decide wrongly against petitioner under" the *Lever Bros.* case.

Petitioner, in an appendix to its petition in which it sets forth what it denotes as "Regulations Involved," has included a prefatory statement concerning certain testimony of District officials before a Joint Sub-committee of the Congress. Although this matter, if relevant, would appear to be more properly includible in a statement of the case, nevertheless, the testimony to which petitioner alludes was considered at length by the United States Court of Appeals for the District of Columbia Circuit in *Lever Bros. Co.* v. *District of Columbia*, 92 U.S. App. D.C. 147, 204 F. 2d 39, in which the court, referring to this testimony, noted:

> "* * * During hearings on the 1948 amendment, it is true, the District tax officials stated that it was their practice not to allocate to the District all the income from sales in the District, where the goods were manufactured outside the District 'Because part of that profit was earned by the manufacture, and only part of it by the sale.'[35] But this oral statement concerning allocation practice at that time was inaccurate. *All* the income from sales in which title passed within the District was then allocated to the District, regardless of 'manufacturing profit,' as a reading of the regulations

[35] Statement of Vernon E. West, Corporation Counsel for the District of Columbia, Hearings, *supra*, note 26, at p. 105.

would have shown. Further, the tenuousness of reading a representation of future practice into a statement of present practice seems obvious. Nothing in the record indicates that Congress was influenced by or relied on the quoted statement when it amended the Act."

SUMMARY OF ARGUMENT

Petitioner does not set forth adequate reason for the granting of the petition for writ of certiorari under the considerations governing review on certiorari as set forth by this Court in Rule 19 of its Rules. The decision of the United States Court of Appeals for the District of Columbia Circuit accords with prior decisions of that court which it has followed for a period of approximately 20 years and accords with decisions of this Court upon similar matters. No substantial question is presented by petitioner which calls for the exercise by this Court of its jurisdiction to review this case on writ of certionari.

ARGUMENT

I

This Court declines to review decisions of the courts of the District of Columbia in cases confined in their application to the administration of District of Columbia law. *American Security & Trust Co.* v. *District of Columbia*, 224 U.S. 491, 56 L. Ed. 856, 32 S. Ct. 553, *United Surety Co.* v. *American Fruit Product Co.*, 238 U.S. 140, 59 L. Ed. 1238, 35 S. Ct. 828. As was said in *Del Vecchio* v. *Bowers*, 296 U.S. 280, 285, 80 L. Ed. 229, 56 S. Ct. 190:

> "In the view that the case does not fall within Rule 38, the respondent opposed the issuance of a writ of certiorari. The objection might be valid if the statute were confined in its operation to the

> District of Columbia. We will not ordinarily review decisions of the United States Court of Appeals, which are based upon statutes so limited or which declare the common law of the District."

The statute involved in this case is the District of Columbia Income and Franchise Tax Act of 1947, as amended, a statute directed solely to the raising of revenues for the administration of the District of Columbia Government. This statute does not have application outside the District and, in the absence of extraordinary reason, which this case does not present, this Court will not review proceedings arising under it.

The considerations governing review on certiorari, as set forth in Rule 19 of the Rules of this Court, do not extend to the granting of the petition for certiorari in a case, where, as the record herein shows, the United States Court of Appeals for the District of Columbia Circuit has clearly rendered its judgment in accordance with applicable decisions of this Court.

II

The United States Court of Appeals for the District of Columbia Circuit, in a series of cases arising under the District of Columbia Revenue Act of 1937, the District of Columbia Revenue Act of 1939 and the District of Columbia Income and Franchise Tax Act of 1947, has repeatedly affirmed regulations, promulgated by the Commissioners of the District of Columbia under those acts, containing a sales factor for the purpose of apportioning income to be subjected to District tax in cases where the taxpayer is engaged in the business of selling personal property within and without the District. *Panitz* v. *District of Columbia*, 74 App. D.C. 284, 122 F. 2d 61; *Eastman Kodak Co.* v. *District of Columbia*, 76 U.S. App. D.C. 339, 131 F. 2d 347; *Bever Bros. Co.* v. *District of Colum-*

bia, 92 U.S. App. D.C. 147, 204 F. 2d 39; *District of Columbia* v. *Radio Corporation of America*, 98 U.S. App. D.C. 119, 232 F. 2d 376, cert. denied 77 S. Ct. 44, 352 U. S. 845, L.Ed. 2d 51. Each of these cases involved an attack either upon the validity of the Commissioners' regulations, or upon their application to the factual circumstances presented to the Court of Appeals by the complaining taxpayer. In the *Eastman Kodak Co.* case it was contended, as it was and is by Smoot in this case, that the sales formula prescribed by the Commissioners was invalid since it failed to take into account the fact that personal property sold by Eastman in the District of Columbia was produced elsewhere. That contention was rejected by the Court of Appeals.

Thus, currently, and for a period in excess of 20 years, the Commissioners, for the purpose of apportioning to the District income to be subjected to tax under District law, have, in one form or another, with the approval of the highest appellate court of the District, employed a sales factor under various revenue acts in force in the District. That this approach to taxation is a considered approach, conforming with decisions of the Supreme Court in similar matters, was noted by the Court of Appeals in its opinion herein (R. 91-103). That court observed that *Underwood Typewriter Co.* v. *Chamberlain*, 254 U.S. 113, 41 S. Ct. 45, 65 L. Ed. 165; *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Commission*, 266 U.S. 271, 45 S. Ct. 82, 69 L. Ed. 282, and *National Leather Co.* v. *Massachusetts*, 277 U.S. 413, 48 S. Ct. 534, 72 L. Ed. 935 each sustained use of a one factor formula under the proof adduced in those cases. In all of those cases, as the Court of Appeals observed, Constitutional attacks upon single factor formulas were rejected, and the apportionment of income on the basis of single factor formulas was upheld. The United States has itself employed the single factor of sales for

purposes of the administration of the Federal revenue statutes. *American Mfg. Co.* v. *City of St. Louis*, 250 U.S. 459, 39 S. Ct. 522, 63 L. Ed. 1084.

The contention of petitioner that the District's taxing measures reach income outside the District has been rejected by this Court in numerous similar cases. *New York* v. *Latrobe*, 279 U.S. 421, 49 S. Ct. 377, 73 L. Ed. 776; *Ford Motor Co.* v. *Beauchamp*, 308 U.S. 331, 60 S. Ct. 273, 84 L. Ed. 304, reh. den. 308 U.S. 640, 60 S. Ct. 385, 84 L. Ed. 331; *Wisconsin* v. *J. C. Penney Co.*, 311 U.S. 435, 61 S. Ct. 246, 85 L. Ed. 267, reh. den. 312 U.S. 712, 61 S. Ct. 444, 85 L. Ed. 1143; *International Harvester Co.* v. *Evatt*, 329 U.S. 416, 67 S. Ct. 444, 91 L. Ed. 390, reh. den. 329 U.S. 834, 67 S. Ct. 628, 91 L. Ed. 706. The propriety of determining taxability on the basis of sales is amply demonstrated by both the majority opinion of this Court and the concurring opinion of Mr. Justice Rutledge in *International Harvester Co.* v. *Department of Treasury*, 322 U.S. 340, 361, 64 S. Ct. 1019, 88 L. Ed. 1313. In his concurring opinion, Mr. Justice Rutledge observes that:

> "• • • If, therefore choice has to be made, whether as a matter of exclusive power to tax or as one of allowing credit, it should be in favor of the state of market or consumption as the one most certain to place the same tax load on both the interstate and competing local business."

See also *Department of Treasury of Indiana* v. *Wood Preserving Corporation*, 313 U.S. 62, 85 L. E. 1188, 61 S. Ct. 885; *Norton* v. *Department of Revenue of Illinois*, 340 U.S. 534, 71 S. Ct. 37, 95 L. Ed. 517.

CONCLUSION

Respondent respectfully submits that the judgment of the United States Court of Appeals for the District of

Columbia Circuit in this case was correct and that the petition for writ of certiorari should be denied.

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CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS PROMULGATED BY THE COMMISSIONERS OF THE DISTRICT OF COLUMBIA

Constitutional Provisions Involved

The Fifth and Fourteenth Amendments to the Constitution of the United States of America, Vol. 1, U. S. Code. pp. XLIV and XLV.

"ARTICLE V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

"ARTICLE XIV

"SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutes Involved

District of Columbia Income and Franchise Tax Act of 1947, 61 Stat. 328, ch. 258, as amended by the Act of May 3, 1948, 62 Stat. 206, ch. 246, and by Title IV, District of Columbia Revenue Act of 1949, 63 Stat. 112, ch. 146, and by Title XII, of the District of Columbia Public Works Act of 1954, 68 Stat. 101, ch. 218:

Section 4(h), Article I, Title I (Sec. 47-1551c(h), D. C. Code, 1951).

"SEC. 4. GENERAL DEFINITIONS. — For the purposes of this article and wherever appearing herein, unless otherwise required by the context—

* * * * *

"(h) The words 'trade or business' include the engaging in or carrying on of any trade, business, profession, vocation or calling or commercial activity in the District of Columbia; and include the performance of the functions of a public office.[1] *Provided, however,* That the words 'trade or business' shall not include, for the purpose of this article—

"(1) Sales of tangible personal property whereby title to such property passes within or without the District, by a corporation or unincorporated business which does not physically have or maintain an office, warehouse, or other place of business in the District, and which has no officer, agent, or representative having an office or other place of business in the District, during the taxable year; or

"(2) Sales of tangible personal property by a corporation or unincorporated business which does

[1] As originally enacted in 1947, Sec. 4(h) ended with the words "public office." The proviso to this section was added in its entirety by the Act of May 3, 1948, 62 Stat. 206, ch. 246.

not maintain an office or other place of business in the District and which has no office, agent, or representative in the District except for the sole purpose of doing business with the United States, but such corporations and unincorporated businesses shall be subject to the licensing provisions in title XIV of this article.

"For purposes of this proviso, the words 'agent' or 'representative' shall not include any independent broker engaged independently in regularly soliciting orders in the District for sellers and who holds himself out as such."

Section 1, Article I, Title III (Sec. 47-1557, D. C. Code, 1951.)

"SEC. 1. NET INCOME.—For the purposes of this article and wherever appearing herein, unless otherwise required by the context, the words 'net income' mean the gross income of a taxpayer less the deductions allowed by this article."

Section 2(a), Article I, Title III (Sec. 47-1557a(a) and Sec. 47-1557a(b)(13), D. C. Code, 1951).

"SEC. 2. GROSS INCOME AND EXCLUSIONS THEREFROM.—(a) The words 'gross income' include gains, profits, and income derived from salaries, wages, or compensation for personal services of whatever kind and in whatever form paid, including salaries, wages, and compensation paid by the United States to its officers and employees to the extent the same is not exempt under this article, or income derived from any trade or business or sales or dealings in property whether real or personal, other than capital assets as defined in this article, growing out of the ownership, or sale of, or interest in, such property; also from rent,

royalties, interest, dividends, securities, or transactions of any trade or business carried on for gain or profit, or gains of profits, and income derived from any source whatever.

"(b) The words 'gross income' shall not include the following:

. . . . . .

"(13) Income derived from the sale of tangible personal property to the United States by corporations and unincorporated businesses having their principal places of business located outside the District, which property is delivered from places outside the District for use outside the District: *Provided, however*, that the taxpayer shall furnish to the Assessor a statement in writing of the amount of gross sales so made and, if required by the Assessor, a list of the names of the agencies of the United States through which such property was sold."[2]

Sections 1 and 2, Article I, Title VII (Sec. 47-1571 and 47-1571a, D. C. Code, 1951).

"SEC. 1. TAXABLE INCOME DEFINED.—For the purposes of this title, and unless otherwise required by the context, the words 'taxable income' mean the amount of net income derived from sources within the District within the meaning of title X of this article."

"SEC. 2. IMPOSITION AND RATE OF TAX. For the privilege of carrying on or engaging in any trade or business within the District and of receiving income from sources within the District, there is hereby levied for each taxable year a tax at the rate of 5 per centum upon the taxable

[2] As originally enacted in 1947, the Franchise Tax Act did not include paragraph (13). This paragraph was added by the Act of May 3, 1948, 62 Stat. 206, ch. 246.

income of every corporation, whether domestic or foreign (except those expressly exempt under title II of this article)."

Sections 1 and 2, Article I, Title X (Sec. 47-1580 and 47-1580a, D. C. Code, 1951).

"SEC. 1. PURPOSE OF ARTICLE.—It is the purpose of this article to impose (1) an income tax upon the entire net income of every resident and every resident estate and trust, and (2) a franchise tax upon every corporation and unincorporated business for the privelege of carrying on or engaging in any trade or business within the District and of receiving such other income as is derived from sources within the District: *Provided, however*, That, in the case of any corporation, the amount received as dividends from a corporation which is subject to taxation under this article, and, in the case of a corporation not engaged in carrying on any trade or business within the District, interest received as dividends from a corporation which is subtaxation under this article shall not be considered as income from sources within the District for the purposes of this article. The measure of the franchise tax shall be that portion of the net income of the corporation and unincorporated business as is fairly attributable to any trade or business carried on or engaged in within the District and such other net income as is derived from sources within the District;[3] *Provided, further*, That income derived from the sale of tangible personal property by a corporation or unincorporated business not carrying on or engaging in trade or business within the District as defined in title I of this article shall not be considered as income from sources within the District for purposes of this article, with the exception of income from sales to the United States not excluded from gross income as provided in title III, section 2(b)(13) of this article."

[3] As originally enacted in 1947, this section ended with the words "the District." The proviso following those words was added by the Act of May 3, 1948, 62 Stat. 206, ch. 246

"SEC. 2. ALLOCATION AND APPORTIONMENT.—The entire net income of any corporation or unincorporated business, derived from any trade or business carried on or engaged in wholly within the District shall, for the purposes of this article, be deemed to be from sources within the District, and shall, along with other income from sources within the District, be allocated to the District. If the trade or business of any corporation or unincorporated business is carried on or engaged in both within and without the District, the net income derived therefrom shall, for the purposes of this article, be deemed to be income from sources within and without the District. Where the net income of a corporation or unincorporated business is derived from sources both within and without the District, the portion thereof subject to tax under this article shall be determined under regulation or regulations prescribed by the Commissioners. The Assessor is authorized to employ any formula or formulas provided in any regulation or regulations prescribed by the Commissioners under this article which, in his opinion, should be applied in order to properly determine the net income of any corporation or unincorporated business subject to tax under this article."

REGULATIONS PROMULGATED BY THE COMMISSIONERS OF THE DISTRICT OF COLUMBIA INVOLVED

The Commissioners of the District of Columbia, following enactment of the District of Columbia Income and Franchise Tax Act of 1947, and pursuant to authority contained in that Act, adopted regulations for the purpose of providing a basis for allocation to the District of Columbia for franchise tax purposes of the net income of a corporation deriving income from sources both within and without the District of Columbia.

On August 31, 1948, the Commissioners promulgated regulations reading as follows:

"SEC. 10-2. The measure of the franchise tax shall be that portion of the net income of a corporation or unincorporated business as is fairly attributable to any trade or business carried on or engaged in within the District, as defined in the Act, and such other net income as is derived from sources within the District. The portion of such net income which is 'fairly attributable' to any trade or business or such other net income as is derived from sources within the District shall be determined by allocation and apportionment thereof as prescribed in Sections 10-2(b), 10-2(c), 10-2(d), 10-2(e)."

* * * * * *

"SEC. 10-2(b). The word 'allocated' as hereinafter used in reference to income and deductions therefrom means a determination based upon actual figures specifically applicable thereto; and the word 'apportioned' so used means a ratable portion determined on a percentage basis. If the entire gross income is derived from engaging in a trade or business within the District or from sources within the District, all of such income shall be allocated to the District. If the gross income is derived from engaging in a trade or business partly within and partly without the District or from sources both within and without the District, such gross income shall be allocated and apportioned in accordance with the specific provisions or formulae prescribed in these regulations."

* * * * * *

"SEC. 10-2(d). *Income from Trade or Business.* If the trade or business is carried on entirely within the District, the entire gross income from trade or business shall be allocated to the District. If the trade or business is carried on partly within and partly without the District, that portion of the gross income from trade or business to be apportioned to the District shall be determined as follows:

"(1) *Income from sales of tangible personal property.*

"(a) Where gross income from any taxable year is derived from the manufacture and sale or purchase and sale of tangible personal property, the portion thereof to be apportioned to the District shall be such percentage of the total of such gross income as the District sales made during such taxable year bear to the total sales made everywhere during such taxable year. For the purpose of this regulation the phrase 'District sales' shall mean the gross receipts from all sales made which were principally secured, negotiated, or effected by owners, employees, agents, officers and branches of the corporation or unincorporated business located in the District; and the phrase 'total sales' shall mean the gross receipts from all sales."

The foregoing regulations promulgated August 31, 1948, contained the following provision:

"SEC. 17. *Effective date of Amendments.* The amendments made by these regulations shall apply to the taxable year or part thereof beginning on the first day of January, 1948, and to succeeding taxable years."

On March 17, 1953, the Commissioners of the District of Columbia amended Section 10-2(d)(1)a of the regulations to provide as follows:

"SEC. 10-2(d)(1)a. Where gross income for any taxable year is derived from the manufacture and sale or purchase and sale of tangible personal property, the portion thereof to be apportioned to the District shall be such percentage of the total of such gross income as the District sales made during such taxable year bear to the total sales made everywhere during such taxable year. For the purpose of this regulation the phrase 'District sales' shall mean the gross receipts from all sales made which

were principally secured, negotiated, or effected by owners, employees, agents, officers and branches of the corporation or unincorporated business in the District; and the phrase 'total sales' shall mean the gross receipts from all sales."

On August 6, 1953, the Commissioners further amended the regulations applicable to income and franchise taxes. Section 10-2 of these regulations, as amended on August 6, 1953, provided as follows:

"SEC. 10-2. The measure of the franchise tax shall be that portion of the net income of the corporation and unincorporated business as is fairly attributable to any trade or business carried on or engaged in within the District, as defined in the Act, and such other net income as is derived from sources within the District. The portion of such net income which is 'fairly attributable' to any trade or business or such other net income as is derived from sources within the District shall be determined by allocation and apportionment thereof as prescribed in Secs. 10-2(b), 10-2(d), 10-2(e)."

Section 10-2(b) of the regulations was amended to read as follows:

"SEC. 10-2(b). The word 'allocated' as hereinafter used in reference to income and deductions therefrom means a determination based upon actual figures specifically applicable thereto; and the word 'apportioned' as hereinafter used in reference to net income means a ratable portion determined on a percentage basis. If the entire net income is derived from engaging in a trade or business within the District or from sources within the District, all of such income shall be allocated to the District. If the net income is derived from engaging in a trade or business partly within and partly without the District or from sources both within or without the District, such income shall be allocated and appor-

tioned in accordance with the specific provisions or formulae prescribed in these regulations."

Section 10-2(d)(1)a of the regulations was amended to read as follows:

"SEC. 10-2(d). If the trade or business is carried on or engaged in wholly within the District, the entire net income from trade or business shall be allocated to the District. If the trade or business is carried on partly within and partly without the District, that portion of the net income from trade or business to be apportioned to the District shall be determined as follows:

"(1) Income from sales of tangible personal property.

"(a) Where income for any taxable year is derived from the manufacture and sale or purchase and sale of tangible personal property, the portion thereof to be apportioned to the District shall be such percentage of the total of such income as the District sales made during such taxable year bear to the total sales made everywhere during such taxable year. Every corporation and unincorporated business which carries on or engages in business in the District within the meaning of the words 'trade or business' as defined in the Act is, unless specifically exempted by some provision of the Act, subject to tax. For the purpose of this regulation, the phrase 'District sales' shall mean all sales to District customers the income from which is fairly attributable to the trade or business carried on or engaged in within the District, including solicitation in the District by salesmen or other representatives of the taxpayer, that portion of sales to customers outside the District the income from which is fairly attributable to the trade or business carried on in the District, and sales of tangible personal property the income from which is from District sources."

By Section 15 of the amendments of August 6, 1953, the effective date of those amendments was prescribed as follows:

"SECTION 15. *Effective Date of Amendments.* The amendments made by these regulations shall apply to the taxable year or part thereof beginning on the first day of January, 1948, and to succeeding taxable years."

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No. 713

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

THE SMOOT SAND & GRAVEL CORPORATION, *Petitioner*

v.

DISTRICT OF COLUMBIA, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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Now comes petitioner, by its counsel, and respectfully asks rehearing of its petition for a writ of certiorari filed February 20, 1959 and denied April 20, 1959. Further, in the alternative, in the event the Court is of the opinion that this request for rehearing should not be granted at the present time, petitioner respectfully asks that action on such petition for

rehearing be held in abeyance pending conclusion of litigation in the cases of *District of Columbia* v. *Southern Railway Company* and *District of Columbia* v. *Evening Star Newspaper Company* now pending decision in the United States Court of Appeals for the District of Columbia Circuit.

The grounds for this petition for rehearing and the alternative request that action thereon be held in abeyance, are as follows:

1. In the *Southern Railway Company* case (CA, D.C. No. 14,477) the District of Columbia has employed an entirely different so-called apportionment formula for imposing its income tax than it has employed in the *Evening Star Newspaper Company* case (CA, D.C. Nos. 14,618 and 14,619) and both formulas are different from and antagonistic to that employed in imposing taxation upon petitioner. Because of such lack of uniformity and utterly inconsistent methods of apportionment arbitrarily employed by the District of Columbia it is believed reasonable to assume that this Court may grant certiorari in either or both the *Evening Star Newspaper Company* and the *Southern Railway Company* cases because the country's leading newspapers and major transportation systems are vitally affected by the obviously chaotic lack of uniformity in the imposition of District of Columbia income tax. This is particularly true in the light of the principles enunciated by this Court in *Northwestern States Portland Cement Company* v. *Minnesota*, 3 L. Ed. 2d 421, decided February 24, 1959, subsequent to the filing of petition for writ of certiorari in the instant case.

2. The Southern Railway Company has been taxed on the sole criteria of "costs" in disregard of sales.

The Evening Star Newspaper Company has been taxed on the sole criteria of "manufacturing, production and assembly" in disregard of sales. Petitioner has been taxed on the sole criteria of "sales" in disregard of manufacturing, production and costs.

3. The *Evening Star Newspaper Company* case was argued before the United States Court of Appeals for the District of Columbia Circuit on April 17, 1959. It is understood that the *Southern Railway Company* case will be argued before the Court of Appeals within the near future.

4. Under the terms of the tax imposing statute and the principles enunciated by this Court it would seem to be almost a certainty that the final result in the *Evening Star Newspaper Company* and the *Southern Railway Company* cases will be to require the District of Columbia to take into account consistently all factors involved in an apportionment formula to determine the amount of income fairly attributable to the District. Consequently, unless this petition for rehearing is granted, or action thereon held in abeyance pending the conclusion of such litigation in order that the instant case may be kept open, petitioner may be irreparably damaged and subjected to a serious miscarriage of justice.

CONCLUSION

For the reasons stated above, it is respectfully submitted that this petition for rehearing of order denying petition for a writ of certiorari should be granted, or, in the alternative, action thereon should be held in abeyance pending conclusion of litigation in the cases

of *District of Columbia* v. *Southern Railway Company* and *District of Columbia* v. *Evening Star Newspaper Company*.

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I, David R. Shelton, counsel for petitioner, do hereby certify that the foregoing petition for rehearing in this case is presented in good faith and not for delay and that such petition is restricted to the grounds stated above relating to intervening circumstances of substantial or controlling effect which have occurred since the petition for a writ of certiorari was filed and which will occur subsequent to denial of such petition.

DAVID R. SHELTON

May, 1959.